

Supreme Court, U. S.
FILED

OCT 14 1977

MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM. 1977

NO. 77 - 423

**B. I. BERRY, JUDGE, ET AL.,
Petitioners**

VERSUS

**JUDICIARY COMMISSION OF LOUISIANA
Respondent**

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE LOUISIANA SUPREME
COURT**

**WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL**

**DONALD ENSENAT
ASSISTANT ATTORNEY GENERAL**

**LOUISIANA DEPARTMENT OF JUSTICE
2-3-4 Loyola Bldg., 7th Floor
New Orleans, Louisiana 70112
(504) 568-5575**

**ATTORNEYS FOR JUDICIARY
COMMISSION OF LOUISIANA**

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I.

Jurisdiction

A. The judgment of the Supreme Court of Louisiana was entered on May 16, 1977. The timely petition for re-hearing of Judge Berry, et al (Judges) was denied on June 17, 1977.

No notice of appeal was filed pursuant to Rule 10, and no record was timely docketed pursuant to Rule 13.

The alternative ground for invocation of the jurisdiction of this Court under 28 U.S.C. § 1257(2) is without merit.

B. Mr. Justice Powell extended the time for filing a petition for writ of certiorari to and including September 19, 1977. The jurisdiction of this Court is invoked under 28

U.S.C. § 1257(3).

II.

Questions Presented

No substantial federal question is presented or decided in the judgment of the Louisiana Supreme Court, dated May 16, 1977. Rule 19(a).

III.

Statement of the Case

This is a judicial discipline case under Article V, Section 25(c) of the Louisiana Constitution of 1974, which provides in pertinent part:

"On recommendation of the judiciary commission, the supreme court may censure, suspend with or without salary, remove from office, or retire involuntarily a judge for willful misconduct relating to his official duty, willful and persistent failure to perform his duty, persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute, conduct while in office which constitutes a felony, or conviction of a felony."

On March 5, 1975, pursuant to its constitutional grant of supervisory power over the courts, the Louisiana Supreme Court promulgated a Code of Judicial Conduct, which became effective on January 1, 1976. Art. V, Sec. 5(A), La.

Const. of 1974.

The Louisiana Code of Judicial Conduct was modeled after the Code of Judicial Conduct promulgated by the American Bar Association, and adopted in whole or part by forty (40) states and by the Judicial Conference of the United States.

Contained in the Louisiana Code of Judicial Conduct was Canon 5C(2) which prohibited a Louisiana judge from being a member of the board of directors of a financial institution. Louisiana Canon 5C(2) was the less restrictive alternative presented in the ABA Model Code. The more restrictive alternative prohibited judges from being members of the boards of directors of any corporation, and has been adopted as part of the Code of Conduct for United States Judges.

The judgment sought to be reviewed by this petition is one which affirmed the recommendation of the Judiciary Commission that the Judges by refusing to comply with Canon 5C(2) had engaged in "persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Based on this Louisiana constitutional ground for discipline, the Supreme Court, on recommendation of the Judiciary Commission, suspended the Judges without salary until they complied with Canon 5C(2) of the Code of Judicial Conduct. *In Re Babineaux, et al*, 346 So. 2d 676 (La. S.Ct. 1977).

Prior to this disciplinary proceeding, the Judges had sought and obtained a declaratory judgment of the constitutionality of Canon 5C(2) under the Constitutions of

Louisiana and of the United States. Specifically, the Judges alleged that Canon 5C(2) violated their guarantees to due process, equal protection and freedom of association found in Article I of the Louisiana Constitution of 1974 and in the First and Fourteenth Amendments to the United States Constitution.

The judgment of the Louisiana Supreme Court declaring Canon 5C(2) constitutional under the Constitutions of Louisiana and the United States was entered on December 13, 1976. A timely petition for re-hearing was denied on January 21, 1977. *Babineaux, et al v. Judiciary Commission of Louisiana*, 341 So. 2d 396 (La. S.Ct. 1976).

No notice of appeal was filed, and no petition for a writ of certiorari seeking review of that judgment was timely filed in this Court. That judgment is now final.

Only after final judgment, and only after the Judges persistently and publicly refused to comply with Canon 5C(2), did the Judiciary Commission institute disciplinary proceedings and recommend discipline to the Louisiana Supreme Court.

The sole issue presented in the court below was the recommendation of the Judiciary Commission that the Judges' refusal to comply with Canon 5C(2) was a ground for discipline under the Louisiana Constitution of 1974, and that the discipline to be imposed should be suspension without salary until the Judges complied with Canon 5C(2). The Louisiana Supreme Court adopted the recommendation of the Judiciary Commission. *In Re Babineaux, et al*, 346 So. 2d 676 (La. S.Ct. 1977).

No substantial federal question was raised or decided below, and none is presented in the petition pursuant to Rule 23 (1) (f).

IV.

Argument in Opposition to Granting the Writ

The questions presented in the petition attack the commission form of judicial discipline on its face.

Thirty-three states and the District of Columbia have adopted a judiciary commission plan similar to that of Louisiana. American Judicature Society, *Judicial Disability & Removal Commission, Courts and Procedures*, Page i (1973).

This Court has denied certiorari from a judgment of the Florida Supreme Court adopting the recommendation of a similar judiciary commission. *In Re Kelly*, 238 So.2d 561 (Fla. S.Ct. 1970). cert. den. sub. nom., *Kelly v. Florida Judicial Qualifications Commission*, 401 U.S. 962, reh. den. 403 U.S. 940 (1971).

State judgeships and state judiciary commissions or courts are creatures of state law. A state judicial disciplinary proceeding on its face does not involve a substantial federal question, and this Court has dismissed an appeal on that ground. *Friedman v. Court on Judiciary of New York*, 375 U.S. 10 (1963); see also, *In Re Osterman*, 13 N.Y. 2d a. (1963), cert. den. sub. nom., *Osterman v. Court on the Judiciary of New York*, 376 U.S. 914 (1964).

This Court has also denied certiorari of a federal court constitutional challenge on its face and in application of a state judiciary commission. *Napolitano v. Ward*, 317 F. Supp. 79 (M.D. Ill., 1970), aff'd 457 F.2d 279 (7th Cir. 1972), cert. den. 409 U.S. 1037, reh.den. 410 U.S. 947.

V.

Conclusion

The petition for a writ of certiorari to the Supreme Court of Louisiana does not present a substantial federal question and should be denied.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

DONALD ENSENAT
ASSISTANT ATTORNEY
GENERAL

Certificate of Service

I hereby certify that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been served on:

JOHN P. NELSON, JR.
144 Elk Place, Suite 1202
New Orleans, Louisiana 70112

This 13th day of October, 1977.

DONALD ENSENAT